91-326

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,

Plaintiffs-Appellants-Petitioners,

-vs-

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,

Defendants-Appellees-Respondents,

and

UNITED STATES OF AMERICA,

Substituted Defendant-Appellee-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do the provisions of 28 U.S.C. Sec. 1346(b) and 28 U.S.C. Sec. 2679(d) apply to actions in which it has been alleged that an employee has committed an intentional tort such as a ". . . libel . . . or interference with contract rights . . .", notwithstanding that 28 U.S.C. Sec. 2680 expressly states that the "provisions of [28 U.S.C. Secs. 2671 through 2680] and section 1346(b) of this title shall not apply to" such actions?

No. _____

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is the petition of Thomas M. Hamrick, Randall D. Grosz, Ian L. Fischer, Brant G. Filip and Douglas L. Carter for a writ of certiorari to review the opinion, order and judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

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The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported at 931 F.2d 1209 (7th Cir. 1991); it also is printed in the appendix to this petition at App. 101. The opinion of the United States District Court for the Western District of Wisconsin has not been published; it is printed in the appendix to this petition at App. 108.

JURISDICTIONAL STATEMENT

The opinion, order and judgment of the Seventh Circuit Court of Appeals sought to be reviewed were dated and entered May 8, 1991. App. 101. The statutory provision believed to confer jurisdiction on the Supreme Court to review this case is 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The statutes of the United States that are involved in this case are, in pertinent part, as follows:

28 U.S.C. Sec. 1346(b).

"Subject to the provisions of chapter 171 of this title [28 U.S.C. Secs. 2671 through 2680], the district courts, together with the United States district court for the District of the Canal Zone and the district court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. Sec. 2679(d).

"(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

". . . .

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions . . . ."

28 U.S.C. Sec. 2680.

"The provisions of this chapter [28 U.S.C. Secs. 2671 through 2680] and section 1346(b) of this title shall not apply to—

". . . .

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ."

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint with the State of Wisconsin Circuit Court for Dane County on January 12, 1989. The causes of action alleged in the Complaint are grounded in the state common law torts of libel and intentional interference with employment contract rights. Each of the Plaintiffs, Thomas Hamrick, Randall Grosz, Ian Fischer, Brant Filip and Douglas Carter, is a former employee of the

Veterans Administration Hospital in Madison, Wisconsin. App. 114-115.

Three individuals — Allen Franklin, Nathan Geraths and Rafael Martinez, each of whom is or was an employee of the same Hospital, are named as Defendants in the action. The Complaint against them alleges that, acting in bad faith, with an improper motive and outside the lawful scope of their employment, and for personal reasons unrelated to the lawful duties and responsibilities of their employment at the Hospital, the Defendants libeled and otherwise intentionally interfered with the employment of the Plaintiffs.[1] App. 114-117.

On January 27, 1989 the three individually named Defendants filed a Petition for Removal to District Court with the State Circuit Court, relying on 28 U.S.C. Secs. 1441(a) and 1442 for removal of the lawsuit to the United States District Court for the Western District of Wisconsin. On February 7, 1989 the same three Defendants filed a Motion to Substitute United States of America as Sole Defendant, and Motion to Dismiss with the District Court.

On March 22, 1989 the District Court entered an Order, granting the Motion to substitute the United States as the sole Defendant in the action, relying on 28 U.S.C. Sec. 2679(d), and further granting the individual Defendants' Motion to dismiss the action. The District Court granted the individual Defendants' Motion to Dismiss on the basis that the Court lacked subject matter jurisdiction, because the Plaintiffs had not presented an administrative claim against the Federal Government, as required by the Federal Tort Claims Act at 28 U.S.C. Secs. 2401(b) and 2675, before commencing their lawsuit against Franklin, Geraths and Martinez. The District Court's Judgment dismissing the action was entered on March 23, 1989. App. 107-111.

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[1] The action that is the subject of this appeal was dismissed at the pleading stage and before any answer was filed. The facts alleged in the Complaint are the facts of the case for the purposes of this appeal.

A Notice of Appeal was filed on April 4, 1989. The jurisdiction of the Court of Appeals for the Seventh Circuit was invoked pursuant to 28 U.S.C. Sec. 1291. On May 8, 1991 the Court of Appeals entered its opinion, order and judgment vacating the Judgment of the District Court and remanding the case to the District Court for further proceedings under the Federal Tort Claims Act. App. 101-106.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONTRARY TO THE UNAMBIGUOUS MANDATE OF 28 U.S.C. SEC. 2780.

28 U.S.C. Secs. 2671 through 2680, inclusive, constitute 28 U.S.C. Ch. 171, which also is known as the Federal Tort Claims Act. Generally speaking, this Federal Tort Claims Act defines and limits the consent of the United States to be sued in tort for the negligent acts and omissions of its employees.

The Federal Tort Claims Act, however, does not apply to all torts that may be committed by Federal Government employees. The United States expressly has not given its consent to be sued for certain torts that may be committed by its employees, including those that involve the intentional infliction of injury on other persons. With respect to such torts the language of the Federal Tort Claims Act is clear and unambiguous:

"The provisions of this chapter and section 1346(b) of this title shall not apply . . . ." 28 U.S.C. Sec. 2680.

This exception to the application of the Federal Tort Claims Act applies to *all* of the provisions of the Act, not just to selected provisions. It applies to 28 U.S.C. Ch. 171 in its entirety. None of the provisions of 28 U.S.C. Secs. 2671 through 2680 can have any application in a case that falls within an exception to the application of the Federal Tort Claims Act.

The case at hand falls within an exeption to the Federal Tort Claims Act, in particular, the exception expressly provided for the intentional torts that may be committed by Federal Government employees. 28 U.S.C. Sec. 2680(h). In a case such as this one, in which the causes of action alleged in the Complaint are grounded in the common law torts of libel and intentional interference with employment contract rights, the provisions of the Act, 28 U.S.C. Secs. 2671 through 2780, inclusive, "shall not apply". 28 U.S.C. Sec. 2780.

In reaching its decision in this case the Seventh Circuit Court of Appeals disregarded the mandate of 28 U.S.C. Sec. 2680(h). Instead, it concentrated on whether the administrative scope-of-employment certification provided for at 28 U.S.C. 2679(d)(1) is subject to judicial review. App. 103-105. In other words, the Court of Appeals "put the cart before the horse", and, instead of concentrating on *whether* the provisions of the Federal Tort Claims Act apply in this case, it focused on *how* they apply here. In the process, the Court of Appeals missed the mark.

The language of 28 U.S.C. Sec. 2680(h) is clear and unambiguous: in a case such as this, where the causes of action alleged in the Complaint concern intentional torts committed by persons who happen to be Federal Government employees, the provisions of the Federal Tort Claims Act, 28 U.S.C. Secs. 2671 through 2680, including the administrative scope-of-employment certification provided for at 28 U.S.C. Sec. 2671(d)(1), "shall not apply". Where, as here, the language of a statute is clear and unambiguous, that language should be given effect. E.g., *United States v. James*, 478

U.S. 597, 606 (1986). The failure of the Court of Appeals to do so in this case was error.[2]

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE PURPOSE OF THE FEDERAL TORT CLAIMS ACT, AS WELL AS INCONSISTENT WITH THE LEGISLATIVE INTENTION BEHIND 28 U.S.C. SEC. 2679.

The significance of the decision of the Seventh Circuit Court of Appeals is not limited to the causes of action that have been alleged in the Complaint that is at issue in this case. The application of the reasoning of the Court of Appeals in this case is not limited to the particular persons who happen to be the parties here. The decision of the Court of Appeals in this case applies to every case in which an individual has alleged that he or she has been assaulted, battered or otherwise injured as a result of an intentional tort committed by a person who is an employee of the Federal Government.

What the Court of Appeals has held in this case is that an employee of the Federal Government who has committed any of the intentional torts enumerated at 28 U.S.C. Sec. 2680(h) is absolutely immune from having to answer for his conduct, provided only that it administratively is certified that he was acting within

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[2]At least two other Circuits have applied this same questionable logic. *Nasuti v. Scannell,* 906 F.2d 802, 814 (1st Cir. 1990); *Mitchell v. Carlson,* 896 F.2d 128, 136 (5th Cir. 1990). Another Circuit also appears to have done so, although the basis for its decision is somewhat ambiguous because the Government itself, in the person of several of its departments, was a named party from the very beginning of the lawsuit. *Aviles v. Lutz,* 887 F.2d 1046, 1048-1049 (10th Cir. 1989). Although it has had opportunity to address the application of the Federal Tort Claims Act in a case where another statute has provided the basis for the Government being substituted as a party in a lawsuit, see below at 9-11, the Supreme Court has not heretofore had occasion to consider the issue presented in this case, where the only basis for the substitution of the Government as a party is the Federal Tort Claims Act itself.

the scope of his employment when he committed the tort and that said certification passes judicial review. The corollary of this, of course, as pointed out by the Court, App. 105-106, is that in such a case, because the United States has not consented to be sued for such torts, see 28 U.S.C. Sec. 2680(h), the victim of the intentional tort will have no opportunity to present evidence to a jury and will be foreclosed from having any remedy whatsoever for his or her injury.

Given that even outrageous conduct, under certain circumstances, may be found to have been within the scope of the perpetrator's employment, e.g., *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1085, 1095 (7th Cir. 1990) (victim murdered by mentally ill police officer); *Hibma v. Odegaard,* 769 F.2d 1147, 1150-1151 (7th Cir. 1985) (victim framed for burglaries by sheriff's deputies and imprisoned); *Bell v. City of Milwaukee*, 536 F. Supp. 462, 478 (E.D. Wis. 1982) (wrongful shooting and killing of victim covered up by police officers), the significance of the decision of the Court of Appeals is that the victims of even outrageous, intentional conduct on the part of Federal Government employees may have no recourse or remedy whatsoever for their injuries. It is submitted that such a result is inconsistent with the fundamental purpose of the Federal Tort Claims Act, which is to provide a remedy, albeit a limited one, for persons who have been injured by Federal Government employees, and not to leave such persons in a worse position than they would have been in had the law not been enacted.

Such a result also would be contrary to the legislative intention behind 28 U.S.C. Sec. 2679. 28 U.S.C. Sec. 2679 was amended, to provide for the administrative scope-of-employment certification that is in question here, by the Federal Employees Liability Reform and Tort Compensation Act of 1988, Public Law 100-694. This law was enacted in response to the decision of the Supreme Court in *Westfall v. Erwin*, 108 S. Ct. 580, 585 (1988), which had held that Federal Government employees were shielded from State tort liability only where they acted within the scope of their employment *and* their actions were discretionary in nature.

Concerned that the second condition — that the action in question involve the exercise of discretion, would have its "most severe impact on lower-level employees . . . who are least likely to exercise discretion in carrying out their duties", and noting the run-of-the-mill *negligence* that might expose them to liability in tort, House Report No. 100-700 [to accompany H.R. 4612] at 3 (June 14, 1988), App. 122, the Congress responded to the *Westfall* decision by enacting Public Law 100-694.

In enacting Public Law 100-694 the Congress stated that the "functional effect" of the new law,

". . . . is to return Federal employees to the status they held prior to the *Westfall* decision. That is, Federal employees will be immune for personal liability for actions taken in the course and scope of their employment . . . ." House Report No. 100-700 at 4. App. 123.

The Congress further explained its enactment of the new law as follows: –

". . . . H.R. 4612 provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the 'scope of their employment.' *If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant,* and the individual employee remains liable . . . ." House Report No. 100-700 at 5. App. 124.

In short, contrary to the decision of the Court of Appeals in this case, it was not the intention of the Congress that the adminstrative scope-of-employment certification provided for at 28 U.S.C. Sec. 2679(d)(1) should apply in a case where it is alleged that a Federal Government employee is guilty of "egregious misconduct", such as the intentional torts enumerated at 28 U.S.C. Sec. 2680(h).

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE RELIED ON CASE LAW THAT DOES NOT APPLY HERE.

Having considered how the provisions of the Federal Tort Claims Act apply in this case, the Circuit Court of Appeals concluded that, if, following a judicial review, it is determined that the Defendants properly were certified to have been acting within the scope of their employment, as provided for at 28 U.S.C. Sec. 2679(d)(1), when they committed the intentional torts that are the subject of the Plaintiffs' Complaint, then this matter is governed by the decision issued by the Supreme Court in *United States v. Smith,* 111 S.Ct. 1180 (1991). App. 105. The Court of Appeals' reliance was misplaced.

The case of *United States v. Smith* is different from the case at hand in at least one critical respect. In *United States v. Smith* the cause of action alleged in Mr. and Mrs. Smith's Complaint had been a cause of action for medical malpractice, which malpractice was said to have been committed by a Dr. William Marshall while employed at a United States Army hospital in Italy. Their lawsuit was governed by the Gonzalez Act, 10 U.S.C. Sec. 1089. The instant case, in contrast, does not involve any application of the Gonzalez Act.

In pertinent part, the Gonzalez Act provides as follows:

"Upon a certification by the Attorney General that [a physician accused of malpractice] was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding . . . shall be . . . deemed a tort action brought against the United States under the provisions of title 28 and all references thereto . . ." 10 U.S.C. Sec. 1089(c).

The question presented to the Supreme Court in *United States v. Smith* was whether a medical malpractice action that arose in a foreign country, that was deemed to be "a tort action brought

against the United States" by the operation of 10 U.S.C. Sec. 1089(c), could be maintained against the Doctor as an individual, notwithstanding the exclusive remedy provisions of the Federal Tort Claims Act and 28 U.S.C. Sec. 2680(k), which bars such actions against the Federal Government when they arise in a foreign country.[3]

The critical difference between the situation presented in *United States v. Smith* and the case at hand is that the lawsuit in question in the former case was "deemed a tort action brought against the United States" by the operation of 10 U.S.C. Sec. 1089(c), independent of anything that the Federal Tort Claims Act might have said about the substitution of the United States as the Defendant in the case. Unlike the case at hand, the Federal Government's status as a party to the suit did not depend on the application of any provision found in 28 U.S.C. Secs. 2671 through 2680, the Federal Tort Claims Act. For the purpose of considering how the various provisions of the Federal Tort Claims Act might apply, the Federal Government already was established as the proper Defendant in the case, by the operation of 10 U.S.C. Sec. 1089(c).

In the instant case, however, the Government's status as a party to the lawsuit depends on whether 28 U.S.C. 2679(d)(1) applies. There is no other basis for the substitution of the United States

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[3]The Supreme Court's decision in *United States v. Smith*, 111 S.Ct. 1180, resolved a conflict between the Circuits concerning the relationship of the Gonzalez Act to the Federal Tort Claims Act. Compare *Smith v. Marshall*, 885 F.2d 650, 655 (9th Cir. 1989), *Newman v. Soballe*, 871 F.2d 969, 971-972 (11th Cir. 1989) and *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982), with *Powers v. Schultz*, 821 F.2d 295, 297 (5th Cir. 1987). The instant case does not involve the Gonzalez Act in any way.

as the Defendant in this lawsuit, other than by the operation of 28 U.S.C. Sec. 2679(d)(1). If 28 U.S.C. Sec. 2679(d)(1) has no application here, as has been discussed, because the causes of action in question fall within the exeption to the application of the Federal Tort Claims Act that is found at 28 U.S.C. Sec. 2680(h), then there is no legal basis for the Government's participation as a party in the lawsuit.

Unlike the situation addressed by the Supreme Court in *United States v. Smith*, 111 S.Ct. 1180, there is no basis for the Government's participation as a party in the case at hand, none that is independent of the provisions of the Federal Tort Claims Act itself. Where, as here, those provisions do not apply, 28 U.S.C. Sec. 2680(h), there is no occasion to consider the application of the exclusive remedy provisions of that Act and how they might relate to some other statute. The Court of Appeals overlooked this critical distinction and its reliance on the Supreme Court's decision in *United States v. Smith* was misplaced.

CONCLUSION

The administrative scope-of-employment certification provided for at 28 U.S.C. Sec. 2679(d)(1) is an integral part of the Federal Tort Claims Act and, necessarily, only can have application where the Act itself applies. In those cases where 28 U.S.C. Sec. 2680 states that the provisions of the Federal Tort Claims Act "shall not apply", 28 U.S.C. Sec. 2679(d)(1) can have no application. This would seem to be elementary.

Unlike the situation addressed by the Supreme Court in *United States v. Smith*, 111 S.Ct. 1180, there is no legal basis for the substitution of the United States as a Defendant in the instant lawsuit, at least none that is independent of the provisions of the Federal Tort Claims Act itself. The provisions of the Federal Tort Claims Act, however, "shall not apply" and do not apply in a case such as this case, where the causes of action alleged in the Plaintiffs' Complaint fall within the exception to the application of the Act that is found at 28 U.S.C. Sec. 2680(h).

The decision of the Seventh Circuit Court of Appeals in this case, that is to the contrary, would establish the anomalous proposition that persons who are injured as a result of the negligent acts or omissions of Federal Government employees will find an adequate remedy, while those who are injured as a result of the intentional torts that may be committed by such employees would have no recourse or remedy at all. The Supreme Court has not had occasion before now to consider the issue presented in this case. The opinion, order and judgment of the Court of Appeals below, and their policy implications, should be reviewed by the Supreme Court. The writ requested should be allowed.

Respectfully Submitted,
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Petitioners,

-vs-

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and

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION

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In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1732

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,

Plaintiffs-Appellants,

v.

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Substituted Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 89 C 108—**John C. Shabaz,** *Judge.*

ARGUED FEBRUARY 14, 1990—DECIDED MAY 8, 1991

Before BAUER, *Chief Judge,* WOOD, JR., and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* We have delayed deciding this appeal pending the outcome of a similar case heard by the United States Supreme Court. *United States v. Smith,*

59 U.S.L.W. 4201 (U.S. Mar. 20, 1991). After that decision, the ultimate disposition of this case should be made easier.

The plaintiffs and individual defendants in this action were employees of the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. The plaintiffs filed a complaint against the defendants in the Circuit Court of Dane County, Wisconsin, alleging libel and interference with employment contract rights. The plaintiffs requested a cease and desist order, compensatory and punitive damages.

The defendants removed the case to federal district court. The government then moved to substitute itself as the sole defendant, and to dismiss the action. The government's motion to substitute was based on 28 U.S.C. § 2679. The government argued that the plaintiffs alleged a common law tort, and the Federal Tort Claims Act ("FTCA"), as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("FELRTCA"), provides that a suit against the United States is the exclusive remedy for persons with common law tort claims arising from the actions of federal employees taken within the scope of their employment. The Attorney General's designee had made the required certification pursuant to 28 U.S.C. § 2679(d) that the actions of the defendants were within the scope of their employment. The government wanted the district court to follow the steps contained in § 2679. The motion to dismiss was premised on the plaintiffs' failure to comply with the jurisdictional prerequisite of filing an administrative tort claim against the Veterans Administration. This failure to file, the government argued, deprived the district court of subject matter jurisdiction.

The plaintiffs claimed that the defendants' actions were outside the scope of employment. They also argued that because the exceptions listed in 28 U.S.C. § 2680 are not covered under the FTCA, they may maintain a separate action against the individual defendants for one or more of those torts.

As urged by the government, the district court accepted the scope certification and ordered the United States substituted as the sole defendant pursuant to § 2679(d). The district court then dismissed the case without prejudice for lack of subject matter jurisdiction. The plaintiffs appeal, alleging that the 1988 amendment to the FTCA did not make the FTCA the exclusive remedy for intentional torts explicitly excepted from its coverage.

Before application of the provisions of the FTCA, we must determine whether the scope certification is subject to judicial review. One of the underlying requirements of the FTCA is that the employee be acting within the scope of employment, which is initially determined by the certification.

The government has pulled back from its original position espoused in the district court (and initially before us) that the scope certification is not subject to judicial review. It has dropped that earlier position in a number of other cases as well. *See, e.g., S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir. 1990), *amended*, 924 F.2d 1555 (11th Cir. 1991); *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *cert. granted*, ____ U.S. ____, 111 S. Ct. 1070 (1991). While there appears to be a split in the circuits on this issue, we (and apparently the government) think the better answer lies with the circuits concluding that the scope determination is subject to judicial review. *See S.J. & W. Ranch*, 913 F.2d 1538; *Melo*, 912 F.2d 628; *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990); *see also Cooper v. Kribble*, 1991 U.S. Dist. LEXIS 88 (N.D. Ill. 1991); *Petrousky v. United States*, 728 F. Supp. 890 (N.D.N.Y. 1990). *But see Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989).

We look first to the statutory language contained in the FTCA, as amended by the FELRTCA. 28 U.S.C. § 2679(d)(2) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of

> his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Congress gave the certification conclusiveness with respect to one aspect of the proceedings. But we do not infer from this language that Congress meant to insulate the certification from all judicial review. The statute is not explicit with regard to this, and when read with regard to the certification provisions as a whole, the answer to the question of the propriety of judicial review is ambiguous. Therefore, we might do well to review some of the legislative history surrounding adoption of the FELRTCA.

As other courts have noted, the statements of Representative Frank, the sponsor of the FELRTCA, are helpful. He noted the plaintiff would have the right to contest the certification if the plaintiff thought the Attorney General was certifying without justification. *See Arbour*, 903 F.2d at 421 (citing *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 128 (Apr. 14, 1988) [hereinafter *Legislation*] (statements of Representative Frank)).

The understanding of the legislative sponsor was confirmed by testimony of an official from the Department of Justice. *Legislation*, *supra*, at 128. The Deputy Assistant Attorney General appearing at the hearing even went

on to state that at some point the certification would be reviewable by a court, "probably a Federal District Court." *Id.* at 133, *quoted in S.J. & W. Ranch*, 913 F.2d at 1541. Other courts have noted the potential separation of powers, *S.J. & W. Ranch*, 913 F.2d at 1541; *Nasuti*, 906 F.2d at 813, and due process, *Petrousky*, 728 F. Supp. at 892-95, concerns that would arise absent any type of judicial review of the scope certification. We agree with the government and the plaintiffs here that based on the statutory language and the legislative history, the scope certification is conclusive only with respect to removal, and the district court has the power to review the certification. Further, when a review of the scope certification is requested, as it was here, the district court should give *de novo* review to determine whether the certification was proper. In this review, the plaintiffs have the burden of showing that the defendants' conduct was not within the scope of employment. *See, e.g., S.J. & W. Ranch*, 913 F.2d at 1543.

Without prior guidance on this issue, the district court merely accepted the Attorney General's certification and did not provide judicial review. Now, based on our analysis today, we must remand for a determination as to whether the defendants were acting within the scope of employment. If the district court finds the defendants' actions were within the scope of employment, then the plaintiffs' action is governed by the Supreme Court's recent decision in *United States v. Smith*, 59 U.S.L.W. 4201 (U.S. Mar. 20, 1991). In that case, although one of the exceptions in 28 U.S.C. § 2680 barred recovery under the FTCA for the injury incurred, the plaintiff still could not proceed to seek damages against the particular governmental employee who caused the injury. The Court held that the FELRTCA bars this alternative method of recovery. *Id.* at 4202.

The plaintiffs claim libel and interference with contract rights. Unfortunately, the FTCA contains an exception for these and other similar types of claims in 28 U.S.C.

§ 2680(h). The government thus has a defense which prevents recovery under the FTCA. In addition, because the FELRTCA provides that the remedy under the FTCA is exclusive for employment-related torts, if the district court finds the defendants were acting within the scope of their employment, the plaintiffs will also be barred from bringing an action against the individual defendants.

For the foregoing reasons, the decision of the district court dismissing the action is VACATED and the case is REMANDED for further proceedings consistent herewith.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CASE TITLE: THOMAS HAMRICK, ET AL.
VS.
UNITED STATES OF AMERICA

DOCKET NUMBER: 89-C-108-S

JUDGE: John C. Shabaz

Decision by Court. This action has come on for consideration by the court with the judge (magistrate) named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the defendant, United States of America, and against the plaintiffs, dismissing the complaint of the plaintiffs without prejudice.

/s/Joseph W. Skupnewitz
Clerk
Date 3/23/89

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP, and DOUGLAS L. CARTER,
Plaintiffs,

v.

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,
Defendants.

ORDER
89-C-108-S

The defendants have moved to substitute the United States of America as sole defendant in the above entitled matter and to dismiss.

It is undisputed that plaintiffs have commenced an action alleging that the individually named defendants libeled them and acted with an improper motive outside the lawful scope of their employment.

The defendants argue that pursuant to 28 U.S.C. §2679, as recently amended by the Federal Employee Liability Reform and Tort Compensation Act of 1988 (Public Law 100-694), the Federal Tort Claims Act is the exclusive remedy for any job-related common law torts of federal employees. Defendants argue that where the Attorney General has certified, as here, that the individual defendants were acting within the scope of their employment as employees of the United States at the time

of such [2] incident, the United States should be substituted as the sole defendant.

The plaintiffs argue that pursuant to 28 U.S.C. §2680(h), any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights is excluded from the Act and 28 U.S.C. §1346(b), which provides this Court exclusive civil jurisdiction of civil actions on claims against the United States for monetary relief for injury, loss of property or personal injury or death caused by negligent or wrongful act or omission of any government employees while acting within the scope of their employment.

This Court is of the opinion that §2679(d), as amended, defeats the plaintiffs' argument. According to its provisions, an action against the United States under the Federal Tort Claims Act for any job-related common law tort of its employees becomes an exclusive remedy. The availability of suit under the Act precludes any other civil act or proceeding of any kind from being brought against an individual federal employee or his or her estate if such action or proceeding would sound in common law tort. It is true that where an employee is accused of egregious misconduct rather than neglect or poor judgment, then the United States may not be substituted as the defendant and the United States may not be liable. The test for whether an act was committeed within an employee's scope of employment is generally [3] whether the employee's acts are an incident or a part of or in furtherance of the employee's

employment. The amended section removes potential personal liability of federal employees for common law torts committed within the scope of their employment, providing instead an exclusive remedy in an action against the United States. Here the Attorney General has certified that the defendant employees were acting within the scope of their employment at the time of the incident out of which this lawsuit arose. Once this certification is made, any civil action or proceeding commenced upon such claim in a United States District Court shall be deemed an action against the United States. Once that certification is accomplished, the action shall proceed in the same manner as any action against the United States which has been filed pursuant to §1346(b).

The plaintiffs argue that the United States has not waived its sovereign immunity and/or consented to be sued and to stand liable for the torts committed by individuals who commit such torts as libel and improperly motivated intentional interferences with other persons' employment rights. The Court certainly understands the concerns which plaintiffs have suggested, but is also of the opinion that upon that certification signed by the United States Attorney dated February 7, 1989, the individual defendants Allen R. Franklin, Nathan L. Geraths and Rafael Martinez were acting within the scope of their employment as employees of the United States at the time of the alleged [4] incident. The United States has certified that in spite of the plaintiffs' understanding that the individual employees were engaged in egregious conduct rather than mere negligence or poor judgment, nonetheless they were so acting, and an action

pursuant to the Federal Tort Claims Act is the exclusive remedy upon the facts alleged in plaintiffs' complaint.

The Court accepts the government's certification and, accordingly, will substitute the United States of America as the sole defendant in this action.

The remaining concern, subject matter jurisdiction, can be readily resolved by reference to 28 U.S.C. §§2401(b) and 2675. A tort claim against the United States cannot be commenced unless it is first presented in writing to the appropriate federal agency. It is undisputed that no such claim has been presented to the Veterans Administration. Consequently, this Court lacks subject matter jurisdiction at this time upon the facts alleged in plaintiffs' complaint, an appropriate claim not having been filed.

Accordingly, ORDER

IT IS ORDERED that defendants' motion to substitute the United States of America as sole defendant is GRANTED.

IT IS FURTHER ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction is GRANTED, without prejudice.

Entered this 22nd day of March, 1989.

BY THE COURT:
/s/ JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

THOMAS M. HAMRICK, RANDALL D. GROSZ,
IAN L. FISCHER, BRANT G. FILIP
and DOUGLAS L. CARTER,

Plaintiffs,

v. Case No. 89 CV 0199

ALLEN R. FRANKLIN, NATHAN L. GERATHS
and RAFAEL MARTINEZ,

Defendants.

SUMMONS

THE STATE OF WISCONSIN TO SAID DEFENDANTS:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, with is attached, states the nature and basis of the legal action.

Within twenty (20) days of receiving this Summons you must respond with a written Answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the

Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the Statutes. The Answer must be sent or delivered to the Court, whose address is Clerk of Courts, Circuit Court, Dane County, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to LAWTON & CATES, S.C., the Plaintiffs' attorneys, whose address is 214 West Mifflin Street, Madison, Wisconsin 53703. You may have an attorney help or represent you.

If you do not provide a proper Answer within twenty (20) days the Court may grant Judgment against you for the award of [2] money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A Judgment may be enforced as provided by law. A Judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

LAWTON & CATES, S.C.

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STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,
Plaintiffs,

v. Case No. 89 CV 0199

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,
Defendants.

COMPLAINT

COME NOW The Plaintiffs named above, Thomas M. Hamrick, Randall D. Grosz, Ian L. Fischer, Brant G. Filip and Douglas L. Carter, by their attorneys, LAWTON & CATES, S.C., Bruce M. Davey and Bruce F. Ehlke, and as and for their causes of action against the named Defendants, Allen R. Franklin, Nathan L. Geraths and Rafael Martinez, allege and show to the Court as follows:

1. Each of the Plaintiffs, Thomas M. Hamrick, Randall D. Grosz, Ian L. Fischer, Brant G. Filip and Douglas L. Carter, is an adult resident of Wisconsin. Hamrick resides at N4671 St. Lawrence Bluff Road, Poynette, WI 53955; Grosz resides at 3926 Rockwell Drive,

Madison, Wisconsin 53714; Fischer resides at 1818 Boyd Avenue, Madison, Wisconsin 53704; Filip resides at W10892 HWY V, Lodi, WI 53555 and Carter resides at 126 N. Pardee Street, Box 724, Marshall, WI 53559.

2. Each of the Defendants, Allen R. Franklin, Nathan L. Geraths and Rafael Martinez, is an adult resident of Dane County, Wisconsin. Franklin resides at Bldg. No. 4, William S. Middleton Memorial Veterans' Hospital, 2500 Overlook Terrace, Madison, WI [2] 53705; Geraths resides at 4893 Foxfire Trail, Middleton, WI 53562 and Martinez resides at 7318 Branford Lane West, Madison, WI 53717.

3. At times material to this action, Hamrick, Grosz, Fischer, Filip and Carter, and each of them, has been employed at the William S. Middleton Memorial Veterans' Hospital located at 2500 Overlook Terrace in the City of Madison, Dane County, Wisconsin, and Grosz, Fischer, Filip and Carter continue to be so employed to date. At the same time, Franklin, Geraths and Martinez, and each of them, has been employed at the same Hospital, and each of them continues to be so employed to date.

4. On October 21, 1988 Geraths caused letters to be issued in which he stated that Carter, Filip and Fischer were guilty of criminal conduct--"participating in a sick-out", which was subject to a fine and imprisonment, which statement was derogatory in nature, untrue when made and had an adverse affect on their good names, reputations, standing in the community and employment security.

5. Geraths made said statement knowing that it was false or in reckless disregard of its truth or falseness. Notwithstanding their written request that he retract said statement, to date Geraths has refused and failed to issue the requested retraction.

6. Carter, Filip, Fischer, Grosz and Hamrick are informed and believe that Geraths has issued, or caused to be issued, other letters or written memoranda which also have contained defamatory statements that have been untrue and that have libeled [3] their good names and reputations and adversely affected their standing in the community and employment security. To date, notwithstanding their request for copies of letters or written memoranda that have been issued concerning them, Carter, Filip, Fischer, Grosz and Hamrick have not been furnished the requested copies.

7. At times material to this action, and to date, Franklin, Geraths and Martinez have issued or caused to be issued letters and written memoranda that have contained statements derogatory of Carter, Filip, Fischer, Grosz and Hamrick, and they repeatedly have changed the shift assignments of Carter, Filip, Fischer, Grosz and Hamrick, denied them the lawful use of their accrued sick leave when they were ill or disabled, threatened them with disciplinary action for contrived reasons and reasons without a basis in fact, and otherwise pursued a course of conduct designed to deny promotional and other employment opportunities to Carter, Filip, Fischer, Grosz and Hamrick, and to disrupt and interfere with, and to cause the termination of, their

employment at the Williams S. Middleton Memorial Veterans' Hospital in Madison, Wisconsin.

8. The conduct referred to at Paragraphs 4, 5, 6 and 7 of this Complaint has been engaged in by Franklin, Geraths and Martinez, acting individually and in concert with each other, pursuant to a conspiracy, the unlawful object of which was, and continues to be, an intentional interference with, and the termination of, the employment of Carter, Filip, Fischer, Grosz [4] and Hamrick at the William S. Middleton Memorial Veterans' Hospital in Madison, Wisconsin.

9. The conduct referred to at Paragraph 4, 5, 6, 7 and 8 of this Complaint has been engaged in by Franklin, Geraths and Martinez, acting intentionally and knowingly, in bad faith, with an improper motive and for personal reasons unrelated to the lawful duties and responsibilities of their employment at the William S. Middleton Memorial Veterans' Hospital in Madison, Wisconsin, and said conduct has been, and is, without and in excess of the lawful duties and responsibilities of their employment and outside the lawful scope of their employment at that Hospital. Said conduct has been, and continues to be, extreme and outrageous.

10. As a result of the conduct of Franklin, Geraths and Martinez referred to at Paragraphs 4, 5, 6, 7 and 8 of this Complaint, the employment of Hamrick at the William S. Middleton Memorial Veterans' Hospital has been terminated, the employment of Carter, Filip, Fischer and

Grosz has been interfered with and disrupted, and Carter, Filip, Fischer, Grosz and Hamrick have been caused to suffer emotional distress, injury to reputation and economic injury and monetary loss.

11. As a result of the conduct of Franklin, Geraths and Martinez, their fellow employees at the William S. Middleton Memorial Veterans' Hospital, Carter, Fiip [sic], Fischer, Grosz and Hamrick, have suffered ordinary damages, in an amount to be determined by a jury of their peers.

[5] 12. Because of the willful and malicious conduct of Franklin, Geraths and Martinez, an award of punitive damages against each of them is appropriate, in an amount to be determined by the jury.

WHEREFORE, IT IS PRAYED That Judgment be entered for Douglas L. Carter, Brant G. Filip, Ian L. Fischer, Randall D. Grosz and Thomas M. Hamrick, and against Allen R. Franklin, Nathan L. Geraths and Rafael Martinez,

1. Ordering the Defendants, and each of them, to cease and desist from their unlawful conduct against the Defendants;

2. Directing that Hamrick be reinstated in his employment at the William S. Middleton Memorial Veterans' Hospital, with all wages and benefits restored;

3. Awarding ordinary damages to the Plaintiffs, in an amount to be determined by the jury, against the Defendants, and each of them, jointly and severally;

4. Awarding punitive damages to the Plaintiffs, in an amount to be determined by the jury, against the Defendants, and each of them, jointly and severally;

5. Awarding the Plaintiffs their costs, disbursements and attorneys fees relating to this action; and

6. Granting such other and further relief as may be appropriate.

[6] Dated: January 12, 1989.

LAWTON & CATES, S.C.

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100TH CONGRESS} 2ND SESSION
HOUSE OF REPRESENTATIVES} REPORT 100-700

FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT OF 1988

JUNE 14, 1988--Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. FRANK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4612]

. . . .

[2] PURPOSE OF H.R. 4612

H.R. 4612 would provide immunity for Federal employees from personal liability for common law torts committed within the scope of their employment. A person injured by the actions of a Federal employee would be able to seek damages for such injuries from the United States under the Federal Tort Claims Act.

SUMMARY OF H.R. 4612

H.R. 4612 would amend the Federal Tort Claims Act to address the potential liability of Federal employees which results from the *Westfall* decision. The essential elements

of this bill include: the substitution of the United States as the defendant in any action against a Federal employee who was acting within the scope of employment; the preservation for the United States of any defenses which could be raised because the employee had either legislative or judicial immunity; and the establishment of this remedy against the United States under the Federal Tort Claims Act as the exclusive remedy for the claimant, thus precluding any other action or civil suit against the Federal employee or his estate based upon the same conduct.

BACKGROUND

On January 13, 1988, the United States Supreme Court issued a decision in *Westfall v. Erwin*, 56 U.S.L.W. 4087, which dramatically changed the law which governs the personal tort liability of Federal employees.

Until the *Westfall* decision, the general rule applicable to Federal employees was that they were absolutely immune from personal liability in State common law tort actions for harm that resulted from activities within the scope of their employment. This immunity was based on court decisions which concluded that such immunity was essential if Federal employees were to be willing to carry out the duties of their office. The legal basis for this immunity was the doctrine of sovereign immunity. *Barr v. Matteo*, 360 U.S. 564. As a result of this immunity, the Federal Tort Claims Act (FTCA), which provides for actions for damages for torts against the United States, had

essentially been the exclusive remedy for those allegedly injured by governmental negligence.

However, in *Westfall*, the Supreme Court added an additional requirement for immunity when a Federal employee is sued in his personal capacity. Now, the Federal employee not only must have been acting within the scope of employment (the original standard), but also must have exercised governmental discretion in acting.

Until the *Westfall* decision, nearly all actions against Federal employees in their personal capacity were unsuccessful because those employees were acting in the course and scope of employment, and therefore were immune from personal liability. After *Westfall*, employees may be held personally liable if they were not exercising governmental discretion, even if they were acting in the scope of employment. Moreover, before *Westfall* most actions brought against Federal employees in their personal capacity were resolved through a summary judgment or dismissal early in the [3] case. This early resolution of the case was possible because the employee could be shown to have been acting within the scope of employment, and therefore absolute immunity precluded recovery. Under *Westfall*, summary judgments and dismissals will no longer be readily available because the additional determination as to whether the employee exercised governmental "discretion" will always be a fact-based determination. Thus, the transaction costs (i.e. litigation costs) and length of time needed to resolve the issue of discretion in these

cases will be substantially increased, as will the uncertainty for the individual employee who is sued.

The additional requirement that the Federal employee have exercised discretion in carrying out his or her duty will have its most severe impact on lower-level employees; that is, the "rank and file" workers who are least likely to exercise discretion in carrying out their duties. Examples of the kind of claims that might be brought against these employees include: suits for clerical negligence in typing or filing documents that contributed to delays or errors in benefit determinations; suits against park rangers for injuries suffered at sites supervised or operated by the National Park Service; and suits against maintenance personnel for misplaced electrical cords or improperly mopped floors that may have caused injuries.

The potential increase in liability that results from the *Westfall* decision affects officers and employees of all three branches of government. The possible exposure of Federal employees to personal liability could lead to a substantial diminution in the vigor of Federal law enforcement and implementation. As the Department of Justice stated in testimony before the Subcommittee on Administrative Law and Governmental Relations:

> "The Court's decision [in *Westfall*] may be expected to undermine materially the ability of many Federal agencies to perform their programmatic responsibilities adequately. The prospect of routinely compelling Federal

> employees to subject their personal resources to the lottery of a jury trial will leave them uncertain and intimidated in the performance of any official duties that might expose them to potentially ruinous personal liability. And the list of official actions--especially routine administration of agency programs--that could result in liability under *Westfall* is almost limitless. It is hard to overestimate the impact that this prospect could have upon the morale of the Federal work force, especially rank-and-file workers." Statement of Deputy Assistant Attorney General Robert L. Wilmore, April 14, 1988, p. 5-6.

In issuing its decision in *Westfall*, the Supreme Court explicitly stated:

> "* * * Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of Federal employees involved in state-law tort action would be useful." *Westfall*, p. 8.

[4] H.R. 4612 responds to the *Westfall* decision by establishing legislated standards to govern the immunity of Federal employees who have allegedly committed state common law torts.

DISCUSSION

H.R. 4612 would remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and would instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act (FTCA). The functional effect of H.R. 4612 is to return Federal employees to the status they held prior to the *Westfall* decision. That is, Federal employees will be immune for personal liability for actions taken in the course and scope of their employment. Individuals allegedly harmed by the actions of Federal employees will be able to sue the United States for damages suffered as a result of these actions, but the suit will be exclusively against the United States under the FTCA, rather than against the Federal employee personally.

There is substantial precedent for providing an exclusive remedy against the United States for the actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including:

1. Drivers.--The FTCA (28 U.S.C. 1346(b), 2671-2680) is the exclusive remedy for injuries resulting from the negligent operation of a motor vehicle by a Federal employee acting within the scope of his employment.

2. Medical Personnel.--The FTCA is the exclusive remedy for medical or dental malpractice on the part of the medical personnel of most Federal agencies. (See, e.g., 10 U.S.C. 1089 regarding Department of Defense medical personnel; 22 U.S.C. 2458a regarding NASA medical personnel; 38 U.S.C. 4116 regarding Veterans Administration medical personnel; 22 U.S.C. 2702 regarding State Department physicians; and 42 U.S.C. 233 regarding Public Health Service physicians).

3. Military and Civilian Lawyers of the Department of Defense.--The FTCA is the exclusive remedy for a claim arising out of legal assistance provided by legal staff within the Department of Defense. (10 U.S.C. 1054)

From the perspective of a person injured by the official conduct of a Federal employee, the ability to sue the United States under the FTCA generally has distinct advantages over a suit against the individual Federal employee. The FTCA has an established administrative claims procedure through which many claims can be expeditiously resolved without costly litigation. And, perhaps most important the United States Government will be able to pay any judgment that is awarded, while an individual Federal employee may be "judgment-proof". Therefore, H.R. 4612 not only protects Federal employees, but also will help many of those who may be injured by these employees.

The provisions of H.R. 4612 are designed to carefully establish those circumstances in which the FTCA will constitute the exclusive remedy for the common law torts of Federal employees.

[5] Section 3 of H.R. 4612 explicitly extends the coverage of the FTCA to officers and employees of the legislative and judicial branches. The FTCA currently covers employees of the Executive Branch only.

Section 4 specifically preserves the traditional immunities that have long protected the key functions of the legislative and judicial branches of the government. The United States may assert the judicial or legislative immunity of judicial and congressional employees in so far as it is recognized in the law. However, the specific designation of these immunities does not imply that traditional common law defenses are not available. The United States is liable under the Federal Tort Claims Act. * * * "under circumstances where the United States, if a private person, would be liable * * *" 28 U.S.C. 1346(b). Thus, ordinary tort defenses, such as contributory negligence, assumption of risk, estoppel, waiver, and res judicata, as applicable, continue to be available to the United States. The United States would also be able to continue to assert other functional immunities, such as Presidential and prosecutorial immunity, recognized in the constitution and judicial decisions.

Section 5 amends Section 2679(d) of Title 28 in two respects. First, an action against the United States under

the FTCA for the common law torts of its employees becomes an exclusive remedy. That is, the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual Federal employee or his estate if such action or proceeding would sound in common law tort. The legislative objective is to protect Federal employees from liability by rendering the Federal government solely liable.

However, H.R. 4612 provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the "scope of their employment." If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable. "[T]he test for [whether an act was committed within an employee's scope of employment] is generally whether the employee's act[s] are an incident or, a part of, or in furtherance of, the employee's employment." *Kemerer v. United States*, 330 F. Supp. 731, 733 (W.D. Pa. 1971), *aff'd*, 474 F.2d 1338 (3d Cir. 1973).

For example, under H.R. 4612, a civil suit for damages predicated upon a government maintenance worker's negligent failure to place a caution sign on a wet floor would be exclusively actionable under the FTCA. The employee's failure to properly place the sign on the floor occurred within the scope of his duties, and under H.R. 4612 an injured person would be precluded from bringing suit personally against the Federal employee in his

individual capacity. The injured person would instead be able to sue the United States under the FTCA.

Under the FTCA, the issue of whether an employee was acting within the scope of his employment is governed by the law of the state in which the negligent or wrongful conduct occurred. *Williams v. United States*, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955). The courts have, throughout the years, utilized several discrete principles in examining the scope of employment issue. In [6] Handling Federal Tort Claims, Lester Jayson cites ten separate factors which may be relevant in determining whether an act was within an employee's scope of employment. Among the factors cited are: whether or not the act is one commonly done by such employee; the time, place, and purpose of the act; whether or not the act is outside the enterprise of the employer, or if within the enterprise, whether or not it has been entrusted to any employee; whether or not the employer has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether or not the instrumentality by which the harm was done was furnished by the employer to the employee; the extent of departure from the normal method of accomplishing an authorized result; and whether or not the act is seriously criminal. [citations omitted] Jayson, 2 Handling Federal Tort Claims, §216.01, p. 9-155-56 (1986).

The second major feature of section 5 is that the exclusive remedy expressly does not extend to so-called constitutional torts. See *Bivens v. Six Unknown Agents of the*

Federal Bureau of Narcotics, 403 U.S. 388 (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. The maintenance worker case discussed above is an example of a common law tort. As used in H.R. 4612, the term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence. A good example of such codification of tort causes of action are state wrongful death actions which are predominantly found upon state wrongful death statutes. It is well established that the FTCA applies to such codified torts. See, e.g., *Richards v. United States*, 369 U.S. 1, 6-7 (1962); *Proud v. United States*, 723 F.2d 705, 706-07 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984) applicability of recreational use statute). A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens*, *supra*, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.

The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in his or her estate. See *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Safeway Portland E.F.C.U. v. Federal Deposit [7] Insurance Corporation*, 506 F.2d 1213 (9th Cir. 1974); *Vantrease v. United States*, 400 F.2d 853 (6th Cir. 1968); *Powers v. Schultz*, 821 F.2d 295 (5th Cir. 1987).

The Committee adopted technical amendments to Section 5 to remove any ambiguity as to the effect of the bill. These technical amendments clarify that H.R. 4612 addresses the situation in which a person who is injured by the tortious acts of a Federal employee acting in the scope of employment is seeking money damages for injuries resulting from those tortious acts. The purpose of H.R. 4612 is to provide that such actions for money damages proceed against the United States under the FTCA. The technical amendment to amend section 2679(b)(1) of title 28 makes it clear that an injured person retains the right to seek injunctive or other appropriate equitable relief against either the United States or the Federal employee. The technical amendment to amend section 2679(b)(2) of title 28 makes it clear that the changes made by this Act do not

alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as: *Cort v. Ash*, 422 U.S. 66 (1975); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11 (1979). Clearly, H.R. 4612 does not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal statutes.

Under Section 8, H.R. 4612 explicitly governs all claims which "accrue" after the date of enactment.[1] The provisions of H.R. 4612 also will apply, however, to all claims which have not been reduced to final judgment on the date of enactment, regardless of when they accrued. However, section 8 also contains provisions to ensure that no one is unfairly affected by the procedural ramifications of this provision. For example, if an injury has occurred before H.R. 4612 is enacted, but no lawsuit has yet been filed relative to that claim, the claimant will have to pursue a remedy against the United States, not against the employee. If a lawsuit has been filed, but it has not proceeded to final judgment, the United States will be substituted for the employee (or, if the lawsuit has been

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[1]Although when a claim "accrues" is subject to some legal interpretation, in the usual case it would be the date of the injury for which compensation is sought.

filed against both the United States and the employees, the employee will be dismissed from the suit), and resolution will occur accordingly.

Under H.R. 4612, no one who previously had the right to initiate a lawsuit will lose that right. Similarly, no one who has already initiated a suit will lose their claims solely because the procedural prerequisites associated with the FTCA are being made applicable. Persons who have a claim, but have not initiated a lawsuit, will still be allowed to submit an administrative claim against the United States for up to two years after the date of enactment, or within the time remaining under what otherwise would be the applicable state statute of limitations.[2]

[8] Persons who have initiated a lawsuit but never submitted an administrative claim to the Government[3] will

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[2]For example, if the claimant was injured six months before the date H.R. 4612 was enacted, and the state statute of limitations was three years, the claimant would have two years from the date of the enactment within which to file an administrative claim against the United States. If, in the same state, the claimant was injured two and one-half years before the date of enactment, the claimant would still have six months within which to file such a claim, despite the FTCA's two year statute of limitations. See sec. 8, p. 8 (1.7-16).

[3]A jurisdictional requirement under the FTCA.

not lose their right to pursue a lawsuit for having failed to submit such a claim. Instead, as long as their suit was timely under state law when it was filed, they will have at least 60 more days to file a timely administrative claim. See sec. 6, p. 7 (1.1-9).

H.R. 4612 is supported by the Department of Justice. In addition, it is supported by the President's Council on Integrity and Efficiency, the American Federation of Government Employees, the National Federation of Federal Employees, the Senior Executives Association, and the Federal Managers Association.

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